

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

SUZAN HUGHES, as Guardian, etc.,
Plaintiff and Respondent,

v.

JACK REYNOLDS, as Cotrustee, etc., et al.,
Defendants and Appellants.

A108283

(Los Angeles County
Super. Ct. No. BP062817,

Estate of ALEXANDER R. HUGHES, a
Minor.

SUZAN HUGHES, as Guardian, etc.,
Petitioner and Respondent,

v.

JACK REYNOLDS, as Custodian, etc., et al.,
Objectors and Appellants.

A108284

(Los Angeles County
Super. Ct. No. BP082446)

Trustees Jack Reynolds, Conrad Lee Klein, and Christopher Pair (Trustees), along with Reynolds in his capacity as custodian (Custodian) (collectively, appellants), have timely appealed two related interim orders concerning the Mark Hughes Family Trust (Trust). Appellants contend, among other things, the probate court erred by granting the

interim orders without a full evidentiary hearing. We agree, and reverse the interim orders.

BACKGROUND

Mark Hughes (Mark) died in 2000. His son, Alexander Reynolds Hughes (Alex), born in 1991, is the primary beneficiary of Mark's estate. The estate includes the Trust, with assets worth approximately \$320,000,000, and a custodial account (Custodianship) created pursuant to the Uniform Transfer to Minors Act (Prob. Code, §§ 3900, et seq.), with assets worth approximately \$40,000,000. Mark named Reynolds, Alex's grandfather, Custodian of the Custodianship. Mark also named Reynolds a trustee of the Trust, along with Conrad Klein and Christopher Pair.

Alex's mother, Suzan Hughes (respondent), is Alex's court-appointed guardian. As guardian, respondent oversees the Guardianship, an account which contains approximately \$915,000. Under a marital settlement agreement (Marital Settlement Agreement), respondent receives approximately \$33,000 in monthly spousal support and \$10,000 in monthly child support.

A. Main Petition.

In November 2003, respondent filed a verified petition (Main Petition) seeking an order from the probate court directing the Trustees or Custodian to make certain distributions to her from either the Trust or Custodianship. In particular, respondent sought (1) distributions to reimburse her for expenses she incurred in maintaining Alex's accustomed standard of living from 2000 through the first half of 2003; (2) annual distributions of \$877,193 "so that Alex may continue to live the lifestyle he enjoyed while his father was alive, as required by the Trust"; and (3) reimbursement in the amount of \$2,198,439 for attorney fees she paid "to preserve, protect, and defend Alex's interest in the Trust and Custodianship."

Appellants opposed the Main Petition and trial was set for December 2004.

B. Interim Petitions.

At the probate court's suggestion, on July 19, 2004, respondent filed two additional verified petitions (Interim Petitions) seeking interim distributions from the Custodianship and the Guardianship while her Main Petition was awaiting trial. The Interim Petitions did not seek distributions from the Trust.

The first petition sought an interim distribution of \$929,976.33 from the Custodianship to the Guardianship as an advance for the sums sought in the Main Petition for Alex's care and for legal fees (Interim Custodianship Petition). The second petition sought approval of the Guardian's decision to distribute from the Guardianship to the Guardian \$429,976.33 to reimburse respondent for legal fees she had allegedly incurred on Alex's behalf (Interim Legal Fees Reimbursement Petition). The \$429,976.33 amount represents a portion of the \$929,976.33 sought to be distributed from the Custodianship to the Guardianship in the Interim Custodianship Petition. The \$429,976.33 amount consists of legal fees incurred "in the best interests of and for the benefit of Alex" in (1) defending respondent in connection with the court-appointed guardian ad litem's unsuccessful action to remove respondent as guardian (\$187,715.04); (2) opposing the Trustees' petition regarding development of the Tower Grove property and opposing their petition regarding a proposed allocation of death taxes (\$45,097.93);¹ and (3) prosecuting respondent's objections to the estate accountings filed by the Trustees (\$197,163.36).

C. Hearing on Interim Petitions.

The probate court held a hearing on the Interim Petitions on August 10, 2004. The probate court informed the parties it was not holding "the full trial on [the Main Petition]," but rather a limited hearing solely on respondent's request for interim relief.

¹ The Main Petition identifies \$45,097.93 as the amount expended in connection with the so-called Graegin transaction and related estate tax matters. The Interim Petition, however, identifies it as the amount expended in connection with the Tower Grove transaction and related estate tax matters. We have no reason to resolve this inconsistency here.

The court explained: “[T]his is not the trial. I want to get some kind of a mini snapshot so I can make a decision whether or not to advance funds which may be in whole or 100 percent in part reimbursable.” Over appellants’ repeated objections, the court thus permitted only argument and a limited presentation of evidence in the form of the verified Main and Interim Petitions, the Marital Settlement Agreement, and limited testimony from respondent and Trustee Klein.

Attorneys for appellants declined to cross-examine respondent at the hearing. They explained that, due to the court’s decision the prior evening to preclude witness testimony at the hearing, they were not prepared to question her. They further explained that respondent had produced thousands of pages of discovery the previous week, which they had not had a meaningful opportunity to review. The probate court thereafter declined to permit appellants to offer into evidence the pleadings and declarations filed in connection with their motion for summary adjudication in the case. In so ruling, the court rejected appellants’ argument that the evidence was relevant to whether they properly exercised discretion in declining respondent’s distribution requests.

The probate court also considered over appellants’ objections a presumed child support obligation of \$53,000 per month, a figure generated by DissoMaster, a computer program used in family law proceedings. The probate court explained it considered the DissoMaster figure not as evidence, but merely as a “frame of reference.” It explained: “[The DissoMaster calculation] represents the combined presumed income from the custodial account and the trust, it’s a guess. I don’t know whether it’s right or wrong, but that’s the presumed income.”

After hearing the parties’ arguments and limited presentations of evidence, the probate court acknowledged the evidence supporting the Interim Petitions was “inadequate on the face of it.” In particular, the probate court noted that respondent’s proposed budget for Guardianship expenses lacked sufficient detail. The probate court nonetheless stated it was inclined to grant the petitions and to “make . . . up” a reasonable sum to disburse for Alex’ benefit. The probate court reasoned that respondent, as Alex’s mother, had primary responsibility for his development, and thus should be responsible

for determining the proper amount of income to spend on him given his unique financial position.

D. The Orders.

On September 8, 2004, the probate court filed two orders on respondent's Interim Petitions. The Interim Order Regarding Distribution from Custodianship (Custodianship Order) authorized, ordered and directed the Custodian "to make an immediate interim distribution to" respondent in the amount of \$250,000. The Custodianship Order specified the amount was to be held in the Guardianship for Alex's needs, but up to \$100,000 could be used as an advance for respondent's legal fees and costs. The order stated that the remainder of the Interim Custodianship Petition was denied without prejudice. It further provided that the \$250,000 would be considered an "advance" against the amounts respondent sought in her pending Main Petition. In the event the final judgment on the Main Petition resulted in an award to respondent of less than \$250,000, she would be required to reimburse the difference to the Custodianship without interest.

The second order, entitled Interim Order Regarding Petition for Approval and Confirmation of Guardian's Distribution Decisions (Guardianship Order), permitted respondent to distribute from the Guardianship up to \$100,000 as an advance for her legal fees and costs. The Guardianship Order stated the remainder of the Interim Guardianship Petition was denied without prejudice.

In a minute order dated September 2, 2004, the probate court explained the Custodianship Order and the Guardianship Order (collectively, the Interim Orders) were based on interrelated petitions that had been heard together. The probate court stated it approved the \$100,000 in legal fees and costs in one order as an expenditure of the \$250,000 it ordered to be transferred from the Custodianship to the Guardianship in the other order.

On September 29, 2004, appellants appealed the Interim Orders.² On October 8, respondent moved to dismiss the appeals on the ground the orders were not final and thus not appealable. On December 22, we denied her motion.

DISCUSSION

A. Standing.

As an initial matter, respondent contends appellants lack standing to prosecute this appeal. We reject her contention. The Interim Orders require distribution of Custodianship funds to respondent. Respondent is correct that Alex, not the Custodian, owns the Custodianship funds. (Prob. Code, § 3911, subd. (b).) The Custodian, however, has a duty under the Uniform Transfers to Minors Act (Prob. Code, §§ 3900 et seq.) to manage those funds.³ Section 3913, subdivision (a) of the Act provides that the custodian, when acting in a custodial capacity, has “all the rights, powers, and authority over custodial property that unmarried adult owners have over their own property.” That necessarily includes the right, power and authority to challenge an order affecting distribution of the custodial property. (*Cf. Estate of Kessler* (1948) 32 Cal.2d 367, 370 [estate administrator has standing to appeal an order distributing estate funds “by virtue of his duty to protect the estate from depletion”].)

Given the Custodian’s standing to prosecute this appeal, we need not consider whether the Trustees also have standing. We thus proceed to the merits.

B. Standard of Review.

Respondent’s Interim Custodianship Petition sought an interim distribution of Custodianship funds pursuant to section 3914, subdivision (b). That statute provides: “On petition of an interested person or the minor if the minor has attained the age of 14

² We construe as a request for judicial notice, and deny, respondent’s motion to augment the record on appeal to include the transcript for the November 1, 2004 hearing in this case. The probate court hearing occurred after the orders at issue in this appeal were filed, and concerned an unrelated petition for temporary suspension of the Custodian’s powers. Accordingly, the transcript is not relevant to this appeal.

³ Unless otherwise stated, all statutory citations herein are to the Probate Code.

years, the court *may* order the custodian to deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the court considers advisable for the use and benefit of the minor.” (Emphasis added.) There is no dispute respondent, as Alex's guardian and mother, qualified as an “interested person” under the statute.

Respondent's Interim Legal Fees Reimbursement Petition sought approval and confirmation of her proposal to distribute Guardianship funds to cover certain legal expenses pursuant to sections 2430 and 2403. Section 2430, subdivision (a)(4)(B) permits a guardian, with court authorization, to use funds from the guardianship to pay for legal expenses incurred in the care and administration of the estate. Section 2403, subdivision (a) provides in relevant part: “Upon petition of the guardian . . . , the court *may* authorize and instruct the guardian . . . or approve and confirm the acts of the guardian . . . in the administration, management, investment, disposition, care, protection, operation, or preservation of the estate, or the incurring or payment of costs, fees, or expenses in connection therewith.” (Emphasis added.)

Use of the word “may” in section 3914, subdivision (b) and section 2403, subdivision (a) suggests whether to grant a petition under the statutes is a matter within the probate court's discretion. (*Estate of Ledbetter* (1958) 50 Cal.2d 283, 287.) Here, the probate court exercised its discretion under section 3914, subdivision (b) to order Custodian to distribute to respondent the interim sum of \$250,000 for the use and benefit of Alex. The court then exercised its discretion under section 2403, subdivision (a) to authorize respondent, consistent with section 2430, to distribute from the Guardianship up to \$100,000 as an advance for her legal fees and costs. We review these exercises of discretion by the probate court for abuse of discretion. (*Estate of Denton* (1971) 17 Cal.App.3d 1070, 1074-1075 [appellate court reviews for abuse of discretion the probate court's permissive and not mandatory exercises of power].)

Appellants contend a less deferential standard of review should apply. They dispute the probate court had independent discretion to issue the Interim Orders, arguing instead the court had only limited authority to correct any abuse of their discretion in refusing respondent's requests for distributions. They also dispute that the probate court

had authority to distribute funds on an interim basis, or for the purpose of covering respondent's legal expenses.

The statutory language set forth above fails to support their position. On its face, section 3914, subdivision (b) authorized the probate court to independently order distribution of Custodianship funds. The statute nowhere limited the probate court to ordering final, rather than interim, distributions, or to correcting any abuse of discretion by the Custodian. Likewise, section 2403, subdivision (a) authorized the court to approve or confirm respondent's proposed distribution of Guardianship funds. The statute nowhere precluded the probate court from approving or confirming a distribution of Guardianship funds to cover legal expenses incurred on the Guardianship's behalf. Moreover, section 2430, subdivision (a)(4)(B) permits such distributions.

We found no authority undermining our straightforward interpretations of these statutes.⁴ (*See White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [courts should "look to the statute's words and give them their 'usual and ordinary meaning'"].) Accordingly, we decline to adopt the more restricted interpretations that appellants propose.

C. The Probate Court Abused Its Discretion.

Appellants further contend the trial court erred in denying them a full evidentiary hearing on respondent's Interim Petitions. We agree.

"All issues of fact joined in probate proceedings shall be tried in conformity with the rules of practice in civil actions." (§ 1000.) Section 1022 provides that "[a]n affidavit or verified petition shall be received as evidence when offered in an uncontested proceeding under this code." In a contested proceeding, however, another rule applies: "[W]hen challenged in a lower court, affidavits and verified petitions may not be

⁴ Appellants' reliance on the standard governing a trustee's exercise of discretion is misplaced. (*Cf. Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 458-459 [court should not impose its independent judgment on a trustee absent evidence the trustee abused its discretion].) The Interim Orders related to distributions of Custodianship and Guardianship funds, not Trust funds, and thus are governed by the standards set forth in section 3914, subdivision (b), and section 2403, subdivision (a).

considered as evidence at a contested probate hearing.” (*Evangelho v. Presoto* (1998) 67 Cal.App.4th 615, 620.) Rather, absent a stipulation, each allegation in a verified petition and each fact set forth in a supporting affidavit must be established by competent evidence. (*Ibid.*; *Estate of Duncan* (1969) 1 Cal.App.3d 212, 215.) Such rule is consistent with the long-established rule of civil practice that “[a] party is entitled to have received in evidence and considered by the court, before findings are made, all competent, relevant and material evidence on any material issue.” (*Meadows v. Lee* (1985) 175 Cal.App.3d 475, 488; *see also* § 1046.)

Below, appellants challenged the allegations in respondent’s verified Interim Petitions. The probate court nonetheless declined, over appellants’ repeated objections, to consider all competent, relevant and material evidence on the disputed issues. Rather, the probate court heard argument from all parties, but limited the factual record to the verified petitions, Marital Settlement Agreement, and limited testimony by respondent and Trustee Klein.

In particular, the probate court declined appellants’ request to present further evidence, and declined respondent’s requests to continue the hearing to permit further development of the facts in dispute.⁵ The probate court rejected out-of-hand appellants’ legitimate concern that respondent’s verified petitions contained budgetary figures that lacked evidentiary foundation and improper hearsay opinions from professionals not qualified as experts or present in court. (*See In re Marriage of Cohn* (1998) 65 Cal.App.4th 923, 931 [error for court to rely on income figures lacking “some tangible evidentiary foundation”]; *In re Marriage of Loh* (2001) 93 Cal.App.4th 325, 337-338 [error for court to rely on monetary figures not supported by substantial evidence]; *Whitfield v. Roth* (1974) 10 Cal.3d 874, 894 [testimony concerning the opinion of a doctor not present in court or qualified as an expert was hearsay].)

⁵ Appellants made no offer of proof with respect to the evidence it sought to present at the hearing. We thus have no basis to determine whether the evidence would prove or disprove any material fact.

Further, over appellants' objections, the probate court considered previously undisclosed calculations of presumed child support generated by DissoMaster. The court relied on the calculations as a "frame of reference" rather than evidence, but nonetheless acknowledged the income figures underlying the calculations were "a guess."

Respondent contends the Interim Orders should be affirmed despite the hearing's limitations. She points out that appellants had the opportunity, but declined, to cross-examine her. Respondent misconstrues the record. The probate court ruled the day before the hearing that live testimony would not be permitted, but then decided at the hearing it would hear limited testimony from respondent and Trustee Klein. The probate court's change of position precluded respondents from meaningfully preparing for respondent's cross-examination.

More significantly, the probate court acknowledged on the record that the limited evidence presented in support of the Interim Petitions was insufficient. But rather than permitting further presentation of evidence or continuing the hearing until a further record could be established, the probate court stated it would grant the petitions and "make . . . up" a reasonable sum to disburse on an interim basis for Alex's benefit. In doing so, the probate court erred. The issues underlying the petitions were disputed, and appellants never waived their fundamental right to an evidentiary hearing on them. The probate court's refusal to permit a full hearing thus resulted in an improper procedural and evidentiary foundation for the Interim Orders. Reversal is required.

By this conclusion we do not suggest that, for interim relief to be available in probate proceedings, the evidence must be as complete and satisfactory as at the time of a full trial on the merits. We do suggest, however, that there must be some competent evidence tending to establish certain essential threshold facts, such as the need for the interim award and the custodian's ability to pay for it. (Cf. *In re Marriage of Stich* (1985) 169 Cal.App.3d 64, 71 [interim order for spousal support and attorney fees requires showing of need and ability to pay].) Here, in awarding interim relief, the probate court had no competent evidence before it and restricted the parties' right to prove or disprove disputed facts regarding respondent's need to have interim funds for

Alex's benefit. Instead, the probate court relied on admittedly inadequate figures in respondent's proposed budget and on non-evidentiary figures generated by DissoMaster. In doing so, the probate court abused its discretion.

D. The Probate Court Improperly Ordered the Interim Award of Custodianship Funds Subject to Reimbursement Without Interest.

In awarding respondent the interim distribution of \$250,000 from Custodianship funds, the probate court ruled that, should respondent recover a lesser amount on her Main Petition, she would be required to reimburse the difference to the Custodianship without interest. Appellants contend the probate court erred by failing to make the interim award subject to reimbursement with interest. Their contention has been rendered moot by our decision to reverse the Interim Orders. We nonetheless address it to provide the probate court guidance should it be required to revisit this issue on remand.

We agree with appellants that California law requires payment of interest on underlying sums made payable by court judgment, like the interim award here. "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt." (Civ. Code, § 3287, subd. (a); *see also Santa Clarita Water Co. v. Lyons* (1984) 161 Cal.App.3d 450, 459 ["the *sine qua non* of payment of *interest* is the *entitlement* to some underlying sum made payable by the judgment"].) Accordingly, the probate court erred by failing to make the interim award subject to reimbursement with interest should respondent lose or recover a lesser amount on the Main Petition.

DISPOSITION

The Interim Orders are reversed and the matter is remanded to the probate court for further proceedings consistent with this opinion. In those further proceedings, all parties shall be given the opportunity to present competent, relevant, and material evidence on the material issues. Each side shall bear its own costs on appeal.

Parrilli, J.

We concur:

McGuinness, P. J.

Pollak, J.